

DISTRIBUTABLE (10)

Judgment No. SC 12/04

Civil Appeal No. 270/02

COLCOM FOODS LIMITED v CHRISTOPHER
KABASA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 10 & MARCH 2, 2004

A Mugandiwa, for the appellant

F Nyakabawu, for the respondent

MALABA JA: This is an appeal from a judgment of the labour court delivered on 25 June 2002 declaring that termination of the respondent's employment on notice was unlawful, setting it aside and ordering that the parties should negotiate a retrenchment package.

The facts are common cause. The respondent ("Kabasa") was employed by the appellant company ("Colcom") as a human resources manager. He was allowed to sit as a member of the board of directors of Colcom. That privilege was later withdrawn, with the effect that Kabasa remained a human resources manager with no loss of salary and benefits. Mr Kabasa did not accept the withdrawal of the status of a director, arguing that it constituted a demotion to the position of human resources manager.

Faced with the refusal by Kabasa to work in the position of human resources manager, Colcom gave him three months notice to terminate his contract of employment. The contract of employment entered into by the parties on 6 July 1990 provided that it was terminable by either party giving the other three months notice. Colcom operated a registered employment Code of Conduct ("the Code"). Mr Kabasa admitted that the Code applied to him. It was also conceded in para 7 of the heads of argument that whilst a director can be an employee his termination as director would be dealt with in terms of the Articles of Association of the company. It was conceded further that the removal of Kabasa as a director of Colcom whilst he retained his status of employee as a human resources manager on the same salary and

benefits was not a demotion or retrenchment. Mr Kabasa was therefore an employee to whom the Code applied at the time his contract of employment was terminated as he had lost the status of director.

It was argued that Colcom should have terminated Kabasa's contract of employment in terms of the procedure provided for under the Code or in accordance with the retrenchment procedure set out under the Labour Relations (Retrenchment) Regulations, SI 404/90. This argument is unsustainable in the light of the concession of the fact that the withdrawal of the status of director did not constitute a demotion or retrenchment. It was not an act of misconduct for Kabasa to refuse to accept the change in his conditions of service and as such Colcom was not bound to terminate his employment in terms of the disciplinary procedure laid down in the Code.

In *Chirasasa v Fidelity Life Assurance and Anor* S-135-02 it had been argued that the enactment of s 1A of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 377/90 had not removed the obligation on an employer to obtain prior written approval of the Minister of Labour and Social Welfare ("the Minister") to terminate a contract of employment on notice where a Code of Conduct which applied to an employee existed in the establishment. The full Bench of this Court rejected the argument as said at pp 10-11:

"... when it removed the obligation to obtain the prior written approval of the Minister as a procedural requirement for the termination of a contract of employment on notice, s 1A of the Regulations introduced the procedure contained in the employment Code of Conduct as the method of termination of the contract of employment where the disclosed or undisclosed reason thereof was misconduct on the part of the employee.

Where there was no allegation of misdemeanour, the effect of s 1A of the Regulations was that the employer had a right to terminate the contract of employment on notice, as long as the employee was one to whom the provisions of the registered Code of Conduct applied. The legal effect of s 1A of the Regulations was that a contract of employment could be terminated on notice for any reason other than those relating to misconduct."

In *Chirasasa's* case *supra* the reason for the termination of the contracts of employment of the appellants was that they had refused to accept new

terms and conditions of employment proposed by the employer. They had conceded the fact that there was no act of misconduct alleged against them. It was held that for that reason the employer was entitled to terminate their contracts of employment on notice without having obtained prior written approval of the Minister.

In this case it was conceded that there was no allegation of misconduct levelled against Kabasa. He was not being retrenched. It was his refusal to accept that his status was that of human resources manager that caused the decision to terminate his employment with Colcom on notice.

On the authority of *Chirasasa's* case *supra*, Colcom was entitled to terminate Kabasa's employment on notice. The decision of the labour court to the effect that the termination was unlawful is wrong. It must be set aside.

The appeal succeeds. It is ordered that the decision of the labour court be and is hereby set aside with costs and in its place substituted the following order –

“The appeal against the decision of the senior labour relations officer succeeds with costs and termination of the employee's contract of employment on notice is confirmed.”

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Wintertons, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners